fees to plaintiffs whose § 1983 claims were rejected.[6] In addition, the Ninth Circuit's interpretation of § 1988 conflicts with the decisions of many state appellate courts.[7] As recognized by the Second Circuit, *National Private Truck Council* "is directly on point" in answering whether a party whose federal civil rights claim fails may seek fees under § 1988. *Bonner,* 178 F.3d at 596. The Ninth Circuit has created a conflict in the law by holding otherwise.

III. IF NOT OVERTURNED, THE NINTH CIRCUIT'S DECISION WILL ENCOURAGE THE INCLUSION OF INVALID § 1983 CLAIMS IN CASES PROPERLY RESOLVED UNDER OTHER LAWS.

A. If Left Undisturbed, the Ninth Circuit's Decision will Cause Plaintiffs with Good State-Law Claims to Plead Poor Constitutional Claims, Burdening both the Courts and Local Governments.

The Ninth Circuit's logic provides a strong incentive for plaintiffs to insert invalid § 1983 claims into run-of-the-mill

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[6] *See, e.g., Bonner v. Guccione,* 178 F.3d 581, 595 (2d Cir. 1999); *Luria Bros. & Co. v. Allen,* 672 F.2d 347, 358 (3d Cir. 1982); *Haywood v. Ball,* 634 F.2d 740, 742-43 (4th Cir. 1980); *Raley v. Fraser,* 747 F.2d 287, 290-91 (5th Cir. 1984); *McDonald,* 748 F.2d at 1057; *Reel v. Ark. Dep't of Corr.,* 672 F.2d 693, 697-98 (8th Cir. 1982).

[7] *See, e.g., Or. State Police Officers Ass'n, Inc. v. State,* 783 P.2d 7, 11 (Or. 1989), *cert. denied,* 498 U.S. 810 (1990); *Jackson v. Inhabitants of the Town of Searsport,* 456 A.2d 852, 855-56 (Me.), *cert. denied,* 464 U.S. 825 (1983); *Gumbhir v. Kan. State Bd. of Pharmacy,* 646 P.2d 1078, 1087-90 (Kan. 1982); *Commonwealth v. Lotz Realty Co.,* 376 S.E.2d 54, 59 (Va. 1989).

tort suits and challenges to administrative decisions, in the hope that, *even if those constitutional claims are rejected on the merits*, the plaintiff will receive a fee award. This would impose a tremendous burden on local governments already stretched thin by the proliferation of law suits being filed against them. It would also burden the federal courts by causing plaintiffs to "make a federal case" out of state law claims. As a result, justice will be further delayed for other parties in the federal courts, including plaintiffs with valid § 1983 claims.

The perverse incentive created by this decision will be present in the quite common setting in which a plaintiff has a claim that is promising under state or statutory law, but does not rise to a level of constitutional concern. Such cases are common because, typically, constitutional limitations on governments are exceeded only in extraordinary situations. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting that in its evaluations of "abusive executive action," this Court has held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'"). Indeed, the amici see a recurring pattern of such suits. Disappointed land-use applicants often have a good argument that their applications were denied in violation of state or local law, but weak arguments that the denials constituted a taking, deprivation of due process, or violation of equal protection. *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) (in property-rights disputes, "state courts often afford relief on facts that do not support a federal claim"). Prisoners and detainees often have a good argument that they received negligent medical attention, but a weak argument that such treatment constituted cruel and unusual punishment. *See, e.g., Bailey v. Wood*, 909 F.2d 1197, 1201 (8th Cir. 1990) ("the compensation of prisoners for harms received in prison

is better regulated in state courts through ordinary tort actions. The burden of proof on the plaintiff is much less and the liability of the state can be placed on the supervisory correctional officers through principles of agency."). Thus, it will often be the case that an appellate court will more easily rule in favor of plaintiffs first on non-constitutional theories, then stop. *See, e.g., Triple G Landfills, Inc. v. Board of Comm'rs of Fountain County, Ind.*, 977 F.2d 287, 292 (7th Cir. 1992) (declining to reach dormant commerce clause claim because county ordinance is invalid under state law). The Ninth Circuit's decision created an added incentive for plaintiffs to tack a weak § 1983 claim onto a promising state-law claim, in the hope that the §1983 claim is either not adjudicated or dismissed without appellate review. In either setting, under the Ninth Circuit's reasoning the inclusion of the invalid § 1983 claim likely opens the door to an award of attorney's fees under § 1988 for reasons unrelated to whether the civil rights of the plaintiff were actually violated. *McDonald*, 748 F.2d at 1057.

The consequences of the decision will especially burden local governments in at least two respects. First, as plaintiffs more often add meritless § 1983 claims for the sake of securing fees, local governments will be forced to divert more funds to secure their dismissal. Second, the decision extends liability for attorney's fees to cases where § 1983 claims were rejected but the plaintiff prevailed on nonconstitutional grounds. Because so many § 1983 claims are rejected, the extension of potential attorney's fees liability to this new class of cases poses a very significant new risk.

B. The Ninth Circuit Refused to Limit its Precedent to Cases Where this Court Grants, but Declines to Exercise, Review of Fee-Generating Claims.

In opposing *en banc* review, Respondents argued that the case presented "unusual factual circumstances." However, the Ninth Circuit's decision was not so limited.[8] The Ninth Circuit's decision provided no principled reason for limiting the impact of its holding to cases that reach this Court. The Ninth Circuit necessarily held that a fee-generating claim should be considered "unaddressed" even after it has been dismissed on the merits, if the last court to review the claim did not also address its merits when given the opportunity. App.11, 15. Thus, unless it is set aside by this Court, the precedent established by the Ninth Circuit will extend to a wide variety of cases.

What mattered to the Ninth Circuit was whether the final court that heard the fee-generating claims had dismissed them on the merits. While in this case, this Court was that final court, the Ninth Circuit articulated no principle that would confine the scope of its logic to claims that reach this Court. No such principle exists. That is because the grant of certiorari by this Court does not automatically vacate the decision to be reviewed. *See* Sup. Ct. R. 16. As this Court has recognized, its decision to grant certiorari "depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). Even after certiorari is granted, the decision remains valid and precedential unless and until it is vacated.

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[8] In their amicus brief in support of the petition for en banc review, Amici International Municipal Lawyers Association and New Jersey State League of Municipalities asked, in the alternative, that the Ninth Circuit modify the panel decision to limit it to its facts, but the Ninth Circuit declined to do so.

In contrast with procedures followed in California state appellate courts, "[n]o federal rule provides for 'depublication' of a court of appeals' decision once the [U.S.] Supreme Court grants certiorari or notes appellate jurisdiction. The lower court opinion thus remains available as citable precedent on issues not reached by the Supreme Court." *Agric. Labor Relations Bd. v. Tex-Cal Land Mgmt., Inc.*, 739 P.2d 140, 147 n.12 (Cal. 1987).[9]

Certiorari is necessary because the Ninth Circuit's logic will apply with equal force when an intermediate appellate court fails to reach the merits of fee-generating claims that had been dismissed on the merits by a district court. That circumstance is quite common. Because constitutional claims are often the most difficult to establish, courts dismiss many before trial, while non-constitutional claims go forward. A plaintiff might then prevail at trial, or lose at trial and then prevail on appeal. If a plaintiff can prevail (at trial or on appeal) on non-constitutional grounds, it is particularly unlikely that the appellate court will have the opportunity and the need to reach the merits of the trial court's dismissal of the constitutional claims. Under such circumstances, the

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[9] Even after this Court reversed the Ninth Circuit's judgment on other grounds, the Ninth Circuit's dismissal of the fee-generating claims remained valid. *See* App. 19 at n.1 (Graber, J., concurring in the result); *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (per P. Higgenbotham, J.) (explaining "the important difference between our treatment of a panel opinion after *vacatur* by the Supreme Court and our treatment when a judgment is reversed on other grounds"); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000) (in a private-sector employment case "the [U.S. Supreme] Court's vacation of our decision [on Eleventh Amendment grounds, in a previous suit against a state] has no bearing on the correctness of our conclusion that a disparate impact claim is cognizable under the ADEA.").

Ninth Circuit's logic would entitle the plaintiff to receive attorneys' fees unless the intermediate appellate court also reaches the merits of the constitutional claims, and affirms their dismissal.

In any event, the hypothetical possibility that the Ninth Circuit's decision could be limited to its facts does not protect amici. That is because such a distinction will likely be lost on those who bring suits against governments. When drafting a complaint, no litigant will be able to predict which court will be the highest to address their case, or whether any court will exercise discretionary review. But litigants will appreciate that the inclusion of a § 1983 claim in the suit is a necessary first step, and that they may now lose on the merits of that claim without necessarily losing the ability to recover fees under § 1988.

IV. THE NINTH CIRCUIT'S DECISION UPSETS THE BALANCE OF FEDERAL AND STATE AUTHORITY.

Ironically, Plaintiffs who filed a lawsuit to restore the balance of state and federal authority have now established a precedent that will upset that balance in the opposite direction. If, as the Ninth Circuit has now ruled, a plaintiff may lose on the merits of all fee-generating claims while still recovering fees based on its success in non-fee-generating claims, the impact will be felt in cases that arise under state laws and statutes. Allowing success on non-fee-generating claims to become the functional equivalent of success on fee-generating claims, through clever pleading, will compromise federalism in at least two respects.

First, it will override the choices made by state legislators to follow the "American Rule" when providing remedies for state-law violations. Legislators and governors who chose not to include fee-shifting provisions in their state statutes will

have their legislative choices nullified, as plaintiffs shift their fees through the mere expedient of tacking on a claim under § 1983 that is slightly better than frivolous. As the Maine Supreme Court observed when rejecting the path chosen by the court below:

> To allow attorney's fees under section 1988 to parties who assert meritless federal claims along with valid state claims would in many cases effectively abrogate the American Rule. Any person with a claim founded in state law against a state or its subdivisions would have every incentive to interject a section 1983 claim into the action, regardless of its validity.

Jackson, 456 A.2d at 856. Such an approach would impair this Court's longstanding principle that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The remedy for a claim governed exclusively by state law would include a fee award not authorized by state law.

Second, as plaintiffs respond to the added incentive to include invalid federal claims in garden-variety state law disputes, even more state-law disputes will shift into the federal court system. Under principles of comity, this Court should avoid constructions of federal statutes that create such a result. "Due regard for the rightful independence of state governments requires that federal courts scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)) (ellipses omitted). As this Court has held on several occasions, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties[.]" *United Mine Workers*

of Am. v. Gibbs, 383 U.S. 715, 726 (1966). "Recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case." *Id.* at 727.

CONCLUSION

For the foregoing reasons, the National League of Cities, International Municipal Lawyers Association, New Jersey State League of Municipalities, the League of California Cities, and California State Association of Counties, as Amici Curiae, respectfully request the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

JOHN GARAMENDI, in his capacity as Commissioner of Insurance for the State of California
Petitioner,

v.

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, , ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

In *Maher* v. *Gagne*, 448 U.S. 122 (1980), and subsequent decisions, this Court held that a plaintiff who prevails on non-civil rights claims that arise out of the same nucleus of operative fact as substantial, unresolved 42 U.S.C. § 1983 claims should be treated as a prevailing party who is entitled to attorneys' fees under 42 U.S.C. § 1988. The question here is whether this rule applies to the facts of this case, where (a) the plaintiff advanced both substantial fee and non-fee claims that arose out of the same nucleus of operative fact; (b) the Ninth Circuit rejected both sets of claims; and (c) this Court reversed and ruled for the plaintiff on the non-fee claim, while expressly finding it unnecessary to resolve the remaining constitutional claims that were presented under Section 1983.

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STATEMENT

This case involves the rules governing entitlement to attorneys' fees under 42 U.S.C. § 1988. There is no dispute about the governing principle: the parties agree that, as a general matter, fees *are* available when a civil rights plaintiff advances both fee-generating and non-fee claims, the court rules for the plaintiff on the non-fee claim, and the court does not resolve the fee-creating civil rights claim. The question presented in the petition addresses the application of this settled principle to an unusual factual setting, in which the plaintiff advances both fee and non-fee claims, loses on both sets of claims in the lower court, and prevails on the non-fee claim in a higher court that declines to resolve the fee claim.

Review of this question is not warranted. There is no conflict on the issue in the courts of appeals. The question presented arises with great infrequency. And the decision below faithfully applied the principles set out by this Court. Here, this Court ruled for the plaintiffs on the merits on what the Ninth Circuit assumed to be a non-fee claim, finding it unnecessary to resolve the remaining constitutional claims that were presented under Section 1983. As the court below correctly recognized, the plaintiffs should not now be penalized when entitlement to attorneys' fees is considered simply because this Court, when resolving the case in the plaintiffs' favor on the merits, exercised restraint in declining to decide constitutional claims unnecessarily.

1. This dispute grows out of respondents' successful challenge to the constitutionality of a California statute, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"). That law imposed extensive obligations on insurance companies doing business in the State to disclose the details of insurance policies in effect in Europe at any time between 1920 and 1945. See *American Ins. Ass'n* v. *Garamendi* ("*Garamendi*"), 539 U.S. 396 (2003). This disclosure obligation ex-

tended to policies issued by any company "related" to the insurer, "whether or not the companies were related during the time when the policies subject to disclosure were sold" (*id.* at 409-410), and applied to "policies sold to anyone during that time." *Id.* at 410. The penalty for noncompliance was "suspension of the company's license to do business in the State." *Ibid.*

At the time that the HVIRA was debated and enacted, the Federal Government took a very different approach to the problem of obtaining meaningful compensation for Holocaust victims. "From the beginning, the Government's position * * * stressed mediated settlement 'as an alternative to endless litigation' promising little relief to Holocaust survivors." *Garamendi*, 539 U.S. at 405 (citation omitted). To this end, the United States and Germany entered into an executive agreement (the "German Foundation Agreement"), signed by President Clinton and German Chancellor Schroeder, that committed Germany to establish and fund a foundation that would compensate those who suffered at the hands of German companies during the Nazi era. *Id.* at 405-408 (citing 39 INT'L LEGAL MATERIALS 1298 (2000)). For its part, the United States agreed that, because German companies should have "some expectation of security from lawsuits in United States courts" in exchange for their participation in the Foundation, the Federal Government would inform courts that it is "'in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies.'" *Id.* at 405-406 (citation omitted).

Because the HVIRA departed dramatically from the Federal Government's policy regarding compensation for Holocaust survivors, the United States expressed strong disapproval of the statute. After California's Commissioner of Insurance, the petitioner here, issued administrative subpoenas to several subsidiaries of European insurance companies pursuant to the HVIRA, then-Deputy Secretary of State

Eizenstat – the President's representative for Holocaust issues – "[i]mmediately" wrote to both the Commissioner and California's Governor, complaining that the HVIRA "'has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period.'" *Garamendi*, 539 U.S. at 411 (citation omitted).

As this Court observed, however, "[t]hese expressions of the National Government's concern proved to be of no consequence." *Garamendi*, 539 U.S. at 411. The Commissioner – who had vigorously lobbied for enactment of the HVIRA, despite questions raised at the time about the constitutionality and enforceability of the statute (see Ct. App. E.R. 183, 198) – issued what this Court described as an "ultimatum" to insurance companies subject to the HVIRA. *Garamendi*, 539 U.S. at 412. He announced "that he would enforce HVIRA to its fullest, requiring the affected insurers to make the disclosures, leave the State voluntarily, or lose their licenses." *Id.* at 411-412

Respondents then brought suit under 42 U.S.C. § 1983, contending that the HVIRA violated the Commerce Clause, Due Process Clause, and foreign affairs principle of the U.S. Constitution. The district court ruled for respondents on Commerce Clause and foreign affairs grounds, striking down the HVIRA; on the Commissioner's appeal, the Ninth Circuit reversed. *Gerling Global Reinsurance Corp. of Am.* v. *Low*, 240 F.3d 739 (9th Cir. 2001). On remand, the district court then ruled for respondents on due process grounds; the Commissioner again appealed and the Ninth Circuit again reversed. *Gerling Global Reinsurance Corp. of Am.* v. *Low*, 296 F.3d 832 (9th Cir. 2002). This Court in turn granted respondents' petition for certiorari on all three grounds. *American Ins. Ass'n* v. *Garamendi*, 537 U.S. 1100 (2003). The Court ultimately reversed the Ninth Circuit, holding that the HVIRA violates the Constitution's foreign affairs power and agreements executed by the President pursuant to that

power. *Garamendi*, 539 U.S. at 413-429. Having reached that conclusion, the Court "ha[d] no reason to address" the Commerce and Due Process Clause questions. *Id.* at 413 n.7.

2. After this Court's ruling, respondents sought attorneys' fees under Section 1988. The district court denied the request. Pet. App. 20-26. The court recognized that Commerce and Due Process Clause claims are cognizable under Section 1983 and that a plaintiff who prevails on such claims is entitled to an award of fees under Section 1988. But the court reasoned that the Constitution's foreign affairs power (and executive agreements executed under it) do *not* create a "right, privilege, or immunity" within the meaning of Section 1983 and that a plaintiff who prevails on foreign affairs grounds accordingly is not entitled to fees under Section 1988. *Id.* at 24-26. Because this Court had ruled for respondents on foreign affairs grounds, the district court held fees unavailable here.

The court of appeals reversed. Pet. App. 1-19. The court noted that "Due Process Clause and Commerce Clause claims are both properly cognizable, fee-supporting claims under § 1983," and it assumed for purposes of its decision "that the foreign affairs power does not confer rights within the meaning of § 1983." *Id.* at 9. The court thus was "faced with the question whether a court, in an action containing both fee-supporting § 1983 claims and a claim which may not independently support a fee award, may deprive plaintiffs of attorney's fees by grounding its ruling on the non-fee generating claim." *Ibid.* The court concluded that "[a]nswering this question in the affirmative would be inconsistent with both Supreme Court and Ninth Circuit precedent." *Ibid.*

The court of appeals explained that, under the doctrine of *Maher* v. *Gagne*, 448 U.S. 122 (1980), an award of fees is appropriate where a plaintiff prevails on a "'non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional

claim are settled favorably to the plaintiff without adjudication.'" Pet. App. 10 (quoting *Maher*, 448 U.S. at 132). That rule "applies equally to the determination of pendent claims through litigation." *Ibid.* "Under this formulation," the court continued, "for the purpose of qualifying a prevailing party, an unaddressed, fee-supporting claim supports an award of fees if it is both substantial and arises from a common nucleus of operative fact with a dispositive, non-fee-supporting claim addressed by the court." *Id.* at 12. And under this doctrine, fees should be awarded "where, as here, the court of highest authority to hear a case avoids resolution of a fee-supporting federal claim." *Id.* at 11.

The court of appeals added that it made no difference to application of this rule that prior decisions of the Ninth Circuit had rejected the fee-supporting Commerce and Due Process Clause claims before final disposition of the merits by this Court. The court explained that, "[s]o long as an unaddressed, fee-supporting claim meets the substantiality test * * *, and the end result of the litigation grants a plaintiff his desired relief, the unaddressed claim may support a fee award regardless of the decision of the court below." Pet. App. 15. See also *id.* at 19 (Graber, J., concurring in the result) ("The Supreme Court had the opportunity to decide the fee-generating claims and chose not to do so; the policies identified in * * * *Maher* therefore counsel in favor of awarding fees.") (footnote omitted).

Even apart from the rule of *Maher*, the court of appeals found that "the policy behind enactment of § 1988 and the prudential policy of avoiding constitutional questions further supports the conclusion that plaintiffs should be awarded a reasonable fee in this case." Pet. App. 16. The court therefore "decline[d] the Commissioner's invitation to conclude that the Supreme Court must rule in favor of a plaintiff on a specific, fee-supporting aspect of the case in order for a plaintiff to be considered a prevailing party." *Id.* at 17. Because the court held fees available on that basis, it declined to

"reach the question whether the foreign affairs power independently confers private rights" that are enforceable under Section 1983. *Ibid.* The court remanded the case to the district court so that an appropriate fee could be calculated; those proceedings are now pending. The full Ninth Circuit denied a petition for rehearing en banc without dissent.

REASONS FOR DENYING THE PETITION

This case does not warrant further review. The question presented by the Commissioner is whether fees are available under Section 1988 when (a) the plaintiff advances both fee and non-fee claims; (b) a lower court rejects both sets of claims; and (c) a higher court reverses on non-fee grounds while not reaching the fee claims. That issue is an unusual one of limited practical importance that arises with great infrequency; so far as we are aware, it has been addressed in only three cases since Section 1988's enactment. There is no division on the question in the courts of appeals. And the decision below is wholly consistent both with this Court's rulings and with the policies of Section 1988. The petition for certiorari, submitted while the case is in an interlocutory posture, accordingly should be denied.

1. The Decision Below Is Wholly Consistent With The Holdings Of This Court

a. The Commissioner's principal contention is one that goes to the merits of the decision below: he argues that the Ninth Circuit departed from *Maher* and other decisions of this Court addressing entitlement to fees under Section 1988. See Pet. 7-8, 13-15. But the relevant rules in this area of the law have long been settled and noncontroversial. Section 1988 makes attorneys' fees available to "the prevailing party" in Section 1983 litigation. Under the Court's "generous formulation of the term, plaintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

Farrar v. Hobby, 506 U.S. 103, 109 (1992) (citation and internal quotation marks omitted). In this case, of course, plaintiffs achieved *all* of the benefits they sought, "obtain[ing] an enforceable judgment against the defendant." *Farrar*, 506 U.S. at 111. In such circumstances, "[f]ee awards against enforcement officials are run-of-the-mill occurrences." *Supreme Ct. of Va.* v. *Consumers Union of the U.S., Inc.*, 446 U.S. 719, 739 (1980).

Moreover, the Court has made clear that "Congress intended fees to be awarded when a pendent constitutional claim is involved, *even if the * * * claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [Attorney's Fees'] Act.*" *Maher*, 448 U.S. at 132 n.15 (emphasis added). See *id.* at 129 ("Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated."). Under the *Maher* rule, the Court subsequently held, "a prevailing party who asserts substantial *but unaddressed* constitutional claims is entitled to attorney's fees under 42 U.S.C. § 1988." *Smith* v. *Robinson*, 468 U.S. 992, 1004 (1984) (emphasis added). As a consequence, "the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success. The same rule should apply where an unaddressed constitutional claim provides an alternative, but reasonably related, basis for the plaintiff's ultimate relief." *Id.* at 1007 n.10 (citations omitted).

b. The Ninth Circuit's decision is compelled by the *Maher* rule. In arguing to the contrary, the Commissioner contends only that the rule should apply differently in the unusual factual circumstances of this case, where a lower court rejected both the fee and the non-fee claims before the court that had the last word on the merits ruled for the plaintiff on non-fee grounds while leaving the fee claims unre-